Supreme Court, U.S.
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No. 90-1343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE: REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents.*

On Writ of Certiorari
To The Court of Appeals of Texas
Second Court of Appeals District
Fort Worth, Texas

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Respondents St. Joseph Hospital, Inc. and Robert Coffey, M.D.

EVELYN R. LEOPOLD*
RICHARD L. GRIFFITH
ESTIL VANCE

CANTEY & HANGER
801 Cherry Street
Suite 2100
Fort Worth, Texas 76102
(817) 877-2800
FAX (817) 877-2807

**Counsel of Record for Respondents St. Joseph Hospital, Inc. and Robert Coffey, M.D.*

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

BEST AVAILABLE COPY

I. RESPONSE TO QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Reverend Robert Lee Bond v. St. Joseph Hospital, Inc., Robert Coffey, M.D., Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald*, (Opinion Unpublished), violate Bond's rights under the Fourteenth Amendment because it overruled points of error challenging rulings of the trial court on evidentiary points under Texas law.

II. LIST OF ALL PARTIES

The following are parties to this case:

Reverend Robert Lee Bond
Dr. Dwain McDonald
Mrs. Dwain (Jane) McDonald
Dr. Robert Coffey
St. Joseph Hospital, Inc.

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No. 90-1343

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V. OPINIONS AND ORDERS BELOW

Bond submitted an Appendix to the Petition for Writ of Certiorari which sets forth a portion of the unpublished opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, *Bond v. St. Joseph Hospital, Inc. et al* (Tex. App.-Fort Worth 1990, writ denied); denial of review by the Supreme Court of Texas and denial of Bond's motion for rehearing

of the application for writ of error (*See*, Appendix to Petition for Writ of Certiorari p. 1-5). Bond failed to raise a constitutional challenge in any of the assignments of error presented to the courts below. A copy of the Assignments of Error presented to the Court of Appeals for the Second Supreme Judicial District and the Supreme Court of Texas is reprinted at Appendix "A" and "B," respectively, to the subject Response.

VI. OBJECTIONS TO JURISDICTION

1. Title 28 U.S.C. § 1651(a) does not confer jurisdiction.

Bond seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1651(a) which provides:

> (a) The Supreme Court and all courts established by acts of Congress may issue all writs necessary or appropriate **in aid of their respective jurisdictions** and agreeable to the usages and principles of law. [Emphasis added].

Clearly, the power to issue writs is predicated upon a finding of jurisdiction.

Rule 10 of the Rules of the Supreme Court indicate the "character of reasons" that will be considered in granting or denying a petition for certiorari to review state court decisions.

> Rule 10. Considerations Governing Review on Writ of Certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while

neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

* * *

(b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable divisions of this Court.

* * *

Bond does not submit which ground is applicable to his petition because none of the grounds apply.

Rule 14(h) of the Supreme Court Rules provides the procedure for verifying that the ground(s) were presented to the court below:

h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion

> of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

The Petition which summarizes the state court proceedings and the assignments of error presented to the state courts lack the prescribed references and specifications. (See Appendix "A" and "B", hereto.) It is facially insufficient to show any reason to invoke the Court's discretionary review on any ground within the letter or spirit of either Rule 10 or Rule 14 of the Supreme Court Rules. It contains not the slightest intimation that Texas courts have decided any federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals; or that the Texas court has decided any question of federal law at all, let alone an important one. (See Appendix "A" and "B", hereto.)

Bond therefore has failed to raise issues which would properly be before the Court if certiorari were granted.

VII. ARGUMENT

Bond submitted thirty-two points of error to the Court of Appeals, which were overruled, and thirty-four points to the Supreme Court on an Application for Writ of Error, which was denied. None of the points urged that Bond was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, nor did he present any other Constitutional challenge or federal question.

The effort to concoct Constitutional issues from evidentiary questions of state law is transparent and groundless. The opinion and holding below address nothing more than (1) the admission and exclusion of evidence by application of state rules of evidence, and (2) the refusal of the Texas Court of Appeals for the Second Supreme Judicial District to rule on Bond's Motion for Sanctions against St. Joseph Hospital under Rule 13 of the Texas Rules of Civil Procedure.

The subject application for Writ of Certiorari purports to challenge state court rulings on three assignments of error presented to the state courts, none of which presented constitutional issues.

Question No. I addresses Point of Error No. 33, which was not presented to the Court of Appeals but was presented for the first time to the Texas Supreme Court in the Application for Writ of Error. (See Appendix "A" and "B", hereto.) The point was, therefore, waived.

Question No. II addresses Point of Error No. 1, which was submitted to the Fort Worth Court of Appeals and challenged the admission of Bond's medical records over the objections of relevance, hearsay, and timeliness, as well as other grounds which were not presented to the trial court, and which therefore were not reviewed. The point was overruled by the application of Rule 803 (6) and 902 (10) of the Texas Rules of Civil Evidence.

Question No. III addresses Point of Error No. 6 which was submitted to the Texas Court of Appeals and which complained that the court disallowed certain expert testimony regarding standard of care. The Court of Appeals

found that it was error to strike the testimony, but that Bond failed to show that it was harmful error.

Rule 13 of the Texas Rules of Civil Procedure provides that sanctions may be imposed by the trial court against counsel in certain instances. Bond never asked the trial court for any type of relief under Rule 13. There was no ruling for a higher court to review.

The subject Petition is not deserving of consideration for review. There is no reason for this Court to ignore its own strictures to the bar that "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227; 69 L.Ed. 925; 45 S. Ct. 496; 1 U.S.T.C.P. 134; 5 AFTR 5385 (1925). *See Houston Oil Co. v. Goodrich*, 245 U.S. 440; 62 L.Ed. 385; 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508; 68 L.Ed. 413, 44 S. Ct. 164 (1924); and *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178; 82 L.Ed. 1273; 58 S. Ct. 849 (1938). See also the remarks of Chief Justice Taft, in 35 Yale L.J. 1, 3-4; Chief Justice Hughes, in 20 A.B.A.J. 341; and Chief Justice Vinson, in 69 S. Ct. V, VI-VII.

The Petition is frivolous and should be denied.

VIII. PRAYER

Wherefore, St. Joseph Hospital and Robert Coffey, M.D. pray that this Court deny Bond's Petition for Writ of Certiorari and, alternatively, that this Court affirm the judgment of the Court of Appeals. St. Joseph Hospital and Robert Coffey, M.D. further pray that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,

By: _____

EVELYN R. LEOPOLD
801 Cherry Street
Suite 2100
Fort Worth, Texas 76102
(817) 877-2800

Counsel of Record
for Respondents

RICHARD L. GRIFFITH
ESTIL VANCE
CANTEY & HANGER
801 Cherry Street
Suite 2100
Fort Worth, Texas 76102
(817) 877-2800

Additional Counsel
for Respondents

CERTIFICATE OF SERVICE

This hereby certifies that a true and correct copy of the foregoing instrument was mailed, certified mail, return receipt requested, to Mr. Bernard J. Dolenz, J.D., M.D., 6102 Swiss Avenue, Dallas, Texas 75214, Attorney for Petitioner, Reverend Robert Lee Boul, and Mr. Kleber C. Miller, Shannon, Gracey, Ratliff & Miller, 2200 First City Bank Tower, 201 Main Street, Fort Worth, Texas 76102, Attorney for Appellee, Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald on the _____ day of March, 1991.

EVELYN R. LEOPOLD

APPENDIX A

IN THE
COURT OF APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
AT FORT WORTH
NO. 2-88-095-CV

REVEREND ROBERT LEE BOND, *Appellant*,
v.
ST. JOSEPH'S HOSPITAL, ET AL., *Appellees*.

PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff-Appellant
REVEREND ROBERT LEE BOND

Defendants-Appellees
ST. JOSEPH'S HOSPITAL, INC.
DR. DWAIN MCDONALD
MRS. DWAIN (JANE) MCDONALD
DR. ROBERT COFFEY

REQUEST FOR ORAL ARGUMENT

Because appellant is of the opinion that oral argument will be of help to this Court in resolving the legal issues involved in this appeal, appellant, pursuant to Rule 75(f) files this request for oral argument.

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NO. 32: THE TRIAL COURT ERRED IN EXCLUDING MRS. BOND'S TESTIMONY REGARDING THE IMPACT UPON HER HUSBAND'S EMPLOYABILITY BECAUSE OF THE CONDUCT OF THE DEFENDANTS (536) 41

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THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents*

Appealed from the 352nd Judicial District
Court and from the Second Supreme
Judicial District of Texas
No. 2-88-095-CV
of Tarrant County, Texas

WRIT OF ERROR

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, TX 75214
214-821-0220
Tx Bar No. 05957750

ATTORNEY FOR
PETITIONER

NAMES OF ALL PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff-Appellant/Petitioner
REVEREND ROBERT LEE BOND

Defendants-Appellees/Respondents
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NO. 33: THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION P. 21).

NO. 34: THE APPEALS COURT ERRED IN NOT MAKING A RULING ON THE RULE 13 SANCTIONS REQUESTED OF THE COURT AGAINST THE DEFENDANTS FOR GIVING MISINFORMATION TO THE COURT REGARDING DR. BOK'S TESTIMONY AND DEPOSITION STATEMENTS.

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